FILE COPY

Office - Supreme Court, U
FILED
MAY 19 1936
CHARLES ELMORE CRO
CLE

Supreme Court of the United States

OCTOBER TERM, 1935

NO. 667

THE "ARIZONA," ANTONE MARDESICH and wife, PETER MARDESICH and wife, and GENERAL CASUALTY COMPANY OF AMERICA,
Petitioners,

vs.

ANTONIA ANELICH, as Administratrix of the Estate of MARIO ANELICH, Deceased,
Respondent.

PETITION FOR REHEARING

RALPH S. PIERCE
1200 Henry Building, Seattle, Washington
Counsel for Petitioners

EDWIN J. CUMMINS,
GORDON H. SWEANY,
Of Counsel

MAIN 2279
94 Spring Street
SEATTLE, WN

Supreme Court of the United States

OCTOBER TERM, 1935

NO. 667

THE "ARIZONA," ANTONE MARDESICH and wife, PETER MARDESICH and wife, and GENERAL CASUALTY COMPANY OF AMERICA,
Petitioners,

vs.

ANTONIA ANELICH, as Administratrix of the Estate of MARIO ANELICH, Deceased,
Respondent.

PETITION FOR REHEARING

Come now the above named petitioners, the "Arizona," Antone Mardesich and wife, Peter Mardesich and wife, and General Casualty Company of America, and present this, their petition for a rehearing of the above entitled cause, and in support thereof, respectfully show:

I.

That the decision of the Court in its present form leaves undecided one of the most important questions in regard to the defense of assumption of risk, and therefore fails in its purpose to settle the law.

II.

That the decision in stating that assumption of risk was not recognized as a defense prior to the Jones Act in any American case is in error and ignores several cases cited in petitioners' brief.

III.

That the decision apparently fails to grasp that the action herein is based upon negligence and is not one for unseaworthy conditions.

IV.

That the decision ignores cases granting the defense of assumption of risk subsequent to the Jones Act which, in the interests of accuracy, should at least be mentioned.

Since the Court has indicated its wish to discuss and decide only the question of assumption of risk, points raised in this petition are confined to that defense alone.

I.

There has in every case in every jurisdiction been no question upon one point: That is, that as to steve-

dores, longshoremen and harbor workers, the defense of assumption of risk is as available as it would be in an action by any shore employee. *O'Brien v. Luckenbach S. S. Co.*, 293 Fed. 170; *DeLuca v. Shepherd S. S. Co.*, 65 Fed. (2) 566; *Long v. Silverline*, 48 Fed. (2) 15; *The Richelieu*, 48 Fed. (2) 497; *Skolar v. Lehigh Valley R. R. Co.*, 60 Fed. (2) 893; *Scheffler v. Moran Towing & Transport Co.*, 68 Fed. (2) 11; *Holm v. Cities Service Transportation Co.*, 60 Fed. (2) 721; *Jeffries v. DeHart*, 102 Fed. 765; *Cunard S. S. Co. v. Smith*, 255 Fed. 846; *McGinn v. North Coast Stevedoring Co.*, 149 Wash. 1, 270 Pac. 113; *Yaconi v. Brady & Gioe, Inc.*, 246 N. Y. 300, 158 N. E. 876, opinion by Cardozo, C. J.

The plaintiff in each of these cases was a seaman, within the meaning of the Jones Act; in each case decided subsequent to the Jones Act, his action was brought under the Jones Act; is this body of authority, to which other cases could easily be added, representing the most recent decisions of the Circuit Court of Appeals for the Second Circuit, as well as those of other Circuits, to be considered as overruled by the present decision without even a reference being made to it?

The decision in its present form speaks broadly of "seamen." That term has been extended under the Jones Act to cover longshoremen, stevedores, tug boat-

men. *Warner v. Goltar*, 293 U. S. 155. Apparently the effect of the instant decision is to deny to the employer of such casual water workers the defense of assumption of risk. Anelich was such a worker.

It is submitted that no authority can be found to support such a holding; and it is further submitted that the unanimous holding of the courts has been that as to such workmen the reason for the freedom from a defense of assumption of risk does not exist.

This is a question that is left unanswered by the instant decision. Surely it was not the intention of this Honorable Court to overrule a principle having unanimous support in Federal and State courts alike, without reference thereto; yet on the other hand the language of the Court upon the facts of the instant case indicates that this was done.

II.

The decision, in speaking of cases decided before the Jones Act brought by seamen to recover for injuries attributable to defective equipment, contains the following statement:

> "But no American case appears to have recognized assumption of risk as a defense to such a suit."

Petitioners wish to point out the following cases which the Court apparently has overlooked, set forth

on Page 33 of petitioners' brief: *The Maharjah*, 40 Fed. 784; *The Serapis*, 51 Fed. 91; *The Luckenbach*, 53 Fed. 662; *The Saratoga*, 94 Fed. 221; *Jeffries v. DeHart*, 102 Fed. 765; *The Scandinavia*, 156 Fed. 403; *Globe S. S. Co. v. Moss*, 245 Fed. 54; *Cunard S. S. Co. v. Smith*, 255 Fed. 846. It is submitted that prior to the Jones Act, assumption of risk was recognized as a defense in all cases save where an order was given impelling the use of the defective equipment, and thus allowing no room for voluntary assumption of the risk of its use. In the present case there was no such impelling order, nor was there any duty of strict obedience upon Anelich, had such an order been given.

To state that because the defense of assumption of risk was not mentioned in the decision of *The Osceola*, 189 U. S. 158, such defense was not existent is, it is respectfully submitted, drawing an unwarranted inference; contributory negligence was not referred to in *The Osceola*. Many cases have established that both contributory negligence and assumption of risk were defenses prior to the passing of the Jones Act and this Court in answering the questions certified to in *The Osceola* made no reference to either defense.

III.

The decision throughout speaks of unseaworthiness as the basis for the cause of action and states that in

an action for such unseaworthy condition the defense of assumption of risk is not available. Petitioners respectfully assert that this is beside the issue in the present case. This action is not one which could have been maintained prior to the Jones Act. As this Court points out in the instant decision, the action is one necessarily based solely upon the Jones Act and conferred only by that enactment. The Jones Act itself is not a wrongful death statute; its vitality in that respect, and the details regarding how that energy can be exercised, comes only from the Federal Employer's Liability Act. The Federal Employer's Liability Act allows recovery only where the *negligence* on the part of the employer is the proximate cause of the accident to the employee.

The present action, and all actions under the Jones Act, are, therefore, based upon negligence and not upon unseaworthy conditions. This was expressly stated in *Engel v. Davenport*, 271 U. S. 33; and in *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 138.

New rules of liability, drawn from the common law —a common law right of action for negligence—have been drawn into the Maritime law. While it is true that the new rules take their strength in operation only from their inclusion in the Maritime law, yet the scope of those rules — the terms and conditions

upon which the right may be exercised—have already been established at common law. The Jones Act deals with and extends to the personal representative of deceased seaman a common law form of liability to be asserted against the employer of such seaman, and provides for its enforcement in common law courts. "Negligence" and "unseaworthiness" are not synonymous. When seamen are given a right of action for negligence on the part of their employer, is it not logical and sensible that said cause of action shall be modified by the defenses which have become a part of such a cause of action, insofar as they are compatible with the conditions under which the seaman does his work?

IV.

In the interests of accuracy, it should be pointed out that Footnote 3 of the instant decision, containing a list of cases which have denied the defense of assumption of risk since the Jones Act and those contra, is incomplete. To the two cases there cited as contra, in support of the petitioners' position, should be added the following: *Peterson v. Sanford Tug Co.*, 28 Fed. (2) 283; *M. J. McCahan Co. v. Stoffel*, 41 Fed. (2) 651; *The Calvert*, 51 Fed. (2) 494; *The Zealand*, 49 Fed. (2) 781; *Southern Railway Co. v. Hermans*, 44 Fed. (2) 366; *Johnson v. U. S.*, 74 Fed. (2) 703.

Perhaps these cases were overlooked by the Court in making its decision; no mention of them is found elsewhere in the opinion

* * * *

It is submitted that had the plaintiff's decedent in this case been a seaman in the generally accepted meaning of that term, subject to rigid marine discipline and to fine and punishment for disobedience, and that further, had he been ordered by his superior to use the winch, assuming it to be defective, upon the occasion in question, the result that this Honorable Court has reached would be correct.

Petitioners respectfully assert, however, that under the facts presented in the instant case—of a man in the category of a harbor worker, under no strict duty of obedience to orders and, indeed, a worker on shares, almost in the position of a proprietor, included within the munificent provisions of the Jones Act only because of the liberal construction placed upon it, working upon a piece of equipment used by him for many days without complaint or question and after innumerable opportunities to terminate his employment—the decision as handed down is opposed to the great weight of authority in the lower Federal Courts and, what is more important so far as this Court is concerned, opposed to the logic and justice of the rea-

soning of judges the country over. When a plaintiff is in no different position, under no different duty than is a shore worker, and when his cause of action is based upon identical legal duties as the shore worker's, it is respectfully submitted that the ancient and oft repeated principle affording special protection to seamen as the wards of admiralty is unnecessary, and serves only as a convenient device to reach a result which, under the facts here revealed, is unjust and which under present day conditions is no longer necessary.

It is an old adage of the law, even older perhaps than the one that seamen are peculiarly the wards of admiralty, and certainly more fundamental than that, that when the reason for the rule fails, the rule itself does not obtain. Without this fundamental concept in mind, there could be no advancement of the law to keep pace with changing social conditions.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Supreme Court of the State of Washington be, upon further consideration, reversed.

Respectfully submitted,

.....

Counsel for Petitioners.

RALPH S. PIERCE,

CERTIFICATE OF COUNSEL

I, P S. Pierce, counsel for the above named petiti rs, do hereby certify that the foregoing petition a rehearing on this cause is presented in good faith and not for delay.

.....

Counsel for Petitioners.

RALPH S. PIERCE,